MATTER OF C-A-, INC.

DATE: JUNE 7, 2016

APPEAL OF NEBRASKA SERVICE CENTER DECISION

PETITION: FORM I-140, IMMIGRANT PETITION FOR ALIEN WORKER

The Petitioner, an advertising business, seeks to employ the Beneficiary as a graphic designer. It requests classification of the Beneficiary as a member of the professions holding an advanced degree under the second preference immigrant classification. *See* Immigration and Nationality Act (the Act), section 203(b)(2), 8 U.S.C. § 1153(b)(2). This employment-based immigrant classification allows a U.S. employer to sponsor a professional with an advanced degree for lawful permanent resident status.

The Director, Nebraska Service Center, denied the petition. The Director determined that the record did not establish that the Beneficiary had the length of experience required for the position.

The matter is now before us on appeal. The Petitioner contends that the denial of the visa petition should be reversed as the Director imposed a job requirement on the Beneficiary that was not identified in the labor certification application, thereby exceeding its authority. It further asserts that the Director incorrectly refused to consider the Beneficiary's experience with a prior employer because the experience letter was written by an individual no longer working for that employer. Upon *de novo* review, we will dismiss the appeal.

I. AGENCY ROLES IN THE EMPLOYMENT-BASED IMMIGRANT VISA PROCESS

The Petitioner's appeal is based, in part, on its assertion that, in the present matter, U.S. Citizenship and Immigration Services' (USCIS) exceeded the proper limits of its authority versus that of the U.S. Department of Labor (DOL). Accordingly, we will begin our consideration of the Petitioner's appeal by discussing the roles played by USCIS and DOL in the employment-based immigrant visa process.

A. Overview

The employment-based immigrant visa process is generally a three step process. First, the U.S. employer must obtain a labor certification, which DOL processes. *See* 20 C.F.R. § 656, *et seq.* The employer initiates its request for a labor certification by filing an ETA Form 9089, Application for Permanent Employment Certification (labor certification), with DOL. The labor certification sets forth: the position's job duties; the position's education, experience, and other special requirements; the required wage; and the position's work location(s). In addition, as part of the labor certification, a

beneficiary attests to his or her education and experience. The date the labor certification is filed becomes the "priority date" for the immigrant visa petition. 8 C.F.R. § 204.5(d). The DOL's role in certifying the labor certification is set forth at section 212(a)(5)(A)(i) of the Act. 8 U.S.C. § 1182(a)(5)(A)(i). Its approval of the labor certification affirms that, "there are not sufficient [U.S.] workers who are able, willing qualified" to perform the offered position where the beneficiary will be employed, and that the employment of the beneficiary will not "adversely affect the wages and working conditions of workers in the United States similarly employed." *Id.* The labor certification is valid for 180 days from the date of its approval by DOL.

In the second step of the process, a petitioner files a Form I-140, Immigrant Petition for Alien Worker, with USCIS within the 180-day validity period. *See* 20 C.F.R. § 656.30(b)(1), 8 C.F.R. § 204.5. The agency then examines whether a petitioner can establish its ability to pay the proffered wage; whether the education and/or experience required for the offered position matches that required by the visa classification; and whether a beneficiary has the required education, training, and experience for the offered position. *See* section 203(b)(3)(A)(ii) of the Act, 8 U.S.C. § 1153(b)(3)(A)(ii); 8 C.F.R. § 204.5.

If USCIS approves the visa petition, then the beneficiary, in the third and final step, applies for an immigrant visa abroad or, if eligible, adjustment of status in the United States. *See* section 245 of the Act, 8 U.S.C. § 1255.

B. Description of DOL and USCIS Responsibilities

As noted above, DOL's role in the employment-based immigrant visa process is set by section 212(a)(5)(A)(i) of the Act, which provides:

> Any alien who seeks to enter the United States for the purpose of performing skilled or unskilled labor is inadmissible, unless the Secretary of Labor has determined and certified to the Secretary of State and the Attorney General that-
>
> > (I) there are not sufficient workers who are able, willing, qualified (or equally qualified in the case of an alien described in clause (ii)) and available at the time of application for a visa and admission to the United States and at the place where the alien is to perform such skilled or unskilled labor, and
> >
> > (II) the employment of such alien will not adversely affect the wages and working conditions of workers in the United States similarly employed.

However, neither of these inquiries nor the regulations implementing them under 20 C.F.R. § 656, involve a judgment as to whether the job opportunity and the beneficiary of the visa petition are qualified for a specific immigrant classification. Responsibility for determining whether the job offer to a beneficiary is a realistic one, whether that beneficiary qualifies for the offered position, and whether an offered position and a beneficiary are eligible for the requested immigrant visa classification lies with USCIS. *See Madany v. Smith*, 696 F.2d 1008, 1012-1013 (D.C. Cir. 1983); see also *K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006, 1008-09 (9th Cir. 1983); *Tongatapu Woodcraft*

Hawaii, Ltd. v. Feldman, 736 F. 2d 1305, 1309 (9th Cir. 1984). The instant appeal will be considered in keeping with these separate DOL and USCIS authorities.

II. JOB REQUIREMENTS

When determining whether a beneficiary is eligible for a preference immigrant visa, USCIS may not ignore a term of the labor certification, nor may it impose additional requirements. *Madany* at 1012-13. We must examine "the language of the labor certification job requirements" in order to determine what the job requires. *Id.* The only rational manner by which USCIS can be expected to interpret the meaning of terms used to describe the requirements of a job in a labor certification is to examine the certified job offer *exactly* as it is completed by the prospective employer. *See Rosedale Linden Park Company v. Smith*, 595 F. Supp. 829, 833 (D.D.C. 1984) (emphasis added). Our interpretation of the job's requirements, as stated on the labor certification must involve reading and applying *the plain language* of the employment certification application form. *Id.* at 834 (emphasis added).

In the present case, Part H. of the labor certification establishes the following requirements for the offered position:

H.4.	Education: Master's.
. . .	
H.4-B.	Major field of study: Graphic design.
. . .	
H.6.	Experience in the job offered: Required.
H.6-A.	Length of required experience: 3 months.
H.7.	Alternate field of study: None accepted.
. . .	
H.8.	Alternate combination of education and experience: None accepted.
. . .	
H.9.	Foreign educational equivalent: Accepted.
H.10.	Experience in an alternate occupation: None accepted.

Therefore, the labor certification establishes the following requirements for the offered position: a U.S. master's or foreign equivalent degree in graphic design and three months of experience in the offered position of graphic designer.

III. BENEFICIARY QUALIFICATIONS

A petitioner must establish a beneficiary's possession of all the education, training, or experience stated on an accompanying labor certification by a petition's priority date. 8 C.F.R. §§ 103.2(b)(1), (12); *see also Matter of Wing's Tea House*, 16 I&N Dec. 158, 159 (Acting Reg'l Comm'r 1977); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg'l Comm'r 1971).

In Part J. of the labor certification, the Beneficiary indicates that he holds a 2011 master's degree in graphic design from [redacted] In Part K., he lists the following employment experience:

- Graphic designer at [redacted] from January 4, 2012, to September 18, 2014 (date of filing of labor certification);
- Graphic designer at [redacted] from November 28, 2011, to December 20, 2011 [22 days];
- Graphic designer (part-time) at [redacted] from October 28, 2011, until November 22, 2011 [15 days]; and
- Graphic designer – Intern at [redacted] from August 29, 2011, until November 23, 2011 [86 days].

In his decision, the Director noted the above employment, but found the terms of the labor certification did not allow for experience gained with the Petitioner. Regulatory requirements at 20 C.F.R. § 656.17 do not allow a beneficiary to qualify for an offered position based on employment experience gained with a petitioner unless that employment is not "substantially comparable" to the job offered. The Director determined that the Beneficiary's employment with the Petitioner as a graphic designer is substantially comparable to the offered position because the job descriptions for both positions on the labor certification are identical. Therefore, it may not be used to establish the Beneficiary's qualifications for the offered position. We agree with the Director.

The Director considered only the Beneficiary's experience with [redacted] and [redacted] In reviewing the experience letters submitted in support of the Beneficiary's employment claims, the Director discounted the letter provided to demonstrate the Beneficiary's experience with [redacted] as it had been written by an individual who was no longer employed by the company. Accordingly, he found that the record did not establish that the Beneficiary had the three months of experience in the offered position required by the labor certification.

On appeal, the Petitioner asserts that the Director's rejection of the experience letter from the Beneficiary's former supervisor at [redacted] violates the regulation at 8 C.F.R. § 204.5(g)(1). The Petitioner maintains that the letter meets the regulation's requirements and that even if it is not a letter from a former employer or trainer, it qualifies as other documentation of the Beneficiary's work experience, which, pursuant to 8 C.F.R. § 204.5(g)(1), must be considered.

The regulation at 8 C.F.R. § 204.5(g)(1) states the following regarding the evidence required to establish employment experience in this proceeding:

> [E]vidence relating to qualifying experience or training shall be in the form of letter(s) from current or former employer(s) or trainer(s) and shall include the name, address, and title of the writer, and a specific description of the duties performed by the alien or of the training received. If such evidence is unavailable, other documentation relating to the alien's experience or training will be considered.

To establish the Beneficiary's prior employment with the Petitioner has submitted an affidavit from who states that she worked for as a Product Development Manager from August 2007 until September 2013. states that she directly supervised the Beneficiary while he was employed as a graphic designer with first as a part-time employee from October 28, 2011, to November 27, 2011, and, thereafter, as a full-time employee from November 28, 2011, to December 20, 2011. statement is not, however, sufficient to establish the Beneficiary's employment experience during the period October 28, 2011 to December 20, 2011.

As noted above, the regulation at 8 C.F.R. § 204.5(g)(1) requires that evidence submitted in support of a beneficiary's employment claims be in the form of letters from current or former employers or trainers. Here, the Petitioner has submitted a statement from an individual claiming to be the Beneficiary's former supervisor, without documenting that employment during the period claimed.

Although this evidentiary deficit was noted by the Director in a request for evidence (RFE), the Petitioner did not respond to the RFE with documentation of employment at a new experience letter from or an explanation as to why this evidence could not be provided. Accordingly, we do not find the affidavit the Petitioner submitted to establish previous employment as a Product Development Manager with the period of her employment or the Beneficiary's employment. The Petitioner cannot meet its burden of proof in this matter simply by claiming a fact to be true, without supporting documentary evidence. *See Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg'l Comm'r 1972)).

The record also contains an affidavit from who indicates that she is employed as the Design Manager at and that she directly supervised the Beneficiary while he was employed by her company as a Graphic Design Intern, from August 29, 2011 to November 23, 2011. states that the Beneficiary's duties as a graphic design intern involved assisting the design team with the development of textile products and print materials, and that he assembled cohesive design presentations, and communicated sample comments to vendors. statement does not, however, demonstrate that the Beneficiary's employment at was in the offered position of graphic designer, as required by the labor certification.

In Part H.11., the Petitioner listed the job duties for the offered position as:

- Design and create innovative concepts and drawings; and
- Execute ideas for direct mail packages, brochures, advertisements, and promotional materials.

description of the Beneficiary's duties while he worked at does not establish that his employment involved the level of responsibility and hands-on design responsibilities reflected in the above description of the duties of the offered position. She does not state that the Beneficiary ever designed or created concepts and drawings while he served as a

Graphic Design Intern, or that he was responsible for translating the company's creative concepts into a range of advertising and promotional materials. Instead, she indicates only that the Beneficiary assisted [redacted] design team and was responsible for assembling design presentations and sending "sample comments" to vendors. Accordingly, we do not find the record to establish that the Beneficiary's employment experience as a Graphic Design Intern at [redacted] was employment experience in the offered position.

We additionally note that it is unclear whether the Beneficiary's internship with [redacted] was a requirement for his master's degree. The Beneficiary's transcripts reflect that he received one academic credit in "Summer II 2011" and that his degree was issued on September 25, 2011. If the Beneficiary's internship with [redacted] was a requirement for his master's degree, it cannot also be used as qualifying experience for the offered job. The Petitioner must resolve this issue in any further filings.

For the reasons just noted, the Petitioner may not use the Beneficiary's employment experience claimed in Part K. of the labor certification to qualify him for the offered position. Therefore, the record does not establish that the Beneficiary had the three months of employment experience required by the labor certification as of the visa petition's priority date. Accordingly, we will affirm the Director's decision and dismiss the appeal.

IV. CONCLUSION

The record does not establish that, as of the priority date of the visa petition, the Beneficiary had the three months of experience as a graphic designer required by the labor certification. Accordingly, we will affirm the Director's denial of the visa petition.

In visa petition proceedings, it is a petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. at 128. Here, that burden has not been met. Accordingly, we will dismiss the appeal.

ORDER: The appeal is dismissed.

Cite as *Matter of C-A-, Inc.*, ID# 16883 (AAO June 7, 2016)